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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-1675

SAM ADAM,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported at 51 Ill. 2d 46, 280 N. E. 2d 205 (1972).

JURISDICTION.

Jurisdiction is adequately alleged in the Petition.

QUESTIONS PRESENTED.

Whether the petitioner-attorney had a constitutional right to refuse to answer questions concerning the date he became an attorney for a named client and the conversation

had between him, his client and a third person while enroute to the Criminal Court absent a prior showing of probable cause by the grand jury.

STATEMENT OF THE CASE.

The petitioner was convicted of contempt of court for refusal to answer certain questions before the grand jury and sentenced to serve a term of ten days.

The petitioner was the attorney for a witness (Shirley Walker) who was called to testify before a grand jury investigating alleged obstruction of justice in the investigation of a murder. The petitioner was called to testify before the grand jury and, although ordered by the court to do so, refused to answer three questions:

"1. When did you become the lawyer for Shirley Walker?

2. Would you tell the Ladies and Gentlemen of the Grand Jury the circumstances surrounding your employment as Shirley Walker's lawyer?

3. I now ask you, Mr. Adam, to inform this Grand Jury as to that conversation that took place between you and Miss Walker and Mr. Pincham on Tuesday morning, September 28, 1971, as you were enroute here to the Criminal Courts Building in Mr. Pincham's car?"

On appeal, the Illinois Supreme Court rejected petitioner's claim that probable cause must be shown before he could be compelled to testify. The Court did not reach petitioner's contention that the questions called for privileged material. The Court held that the attorney-client privilege belongs to the client and that the client may waive the privilege. The Court then found on the basis of petitioner's own assertions in his brief, that the client had waived the privilege as to the material called for by the first and third questions.

As to the second question, the Court held that it was impossible to determine whether or not some of the matters called for by the question would be privileged.* Accordingly, the Court remanded for further proceedings in the trial court.

REASONS FOR DENYING THE WRIT.

The petitioner's initial contention is, in essence, that the Fourth Amendment requires a showing of probable cause before a grand jury may subpoena a witness and compel testimony. This was the question reserved in *Gelbard* v. *United States*, 92 Sup. Ct. 2357, 2360, n. 5.

The petitioner here was clearly called in his capacity as a witness. He was not either a target of the grand jury investigation nor a potential defendant. He has explicitly eschewed any fear of self-incrimination. To us that would appear to place the petitioner in a position different from the person subpoenaed in several of the cases he cites in support of his position. The witness who is requested to give handwriting or voice exemplars (which are not protected by the Fifth Amendment) may have a real concern for his self-protection which in turn might justify the requirement of probable cause before he is compelled to give exemplars. See *In re Dionisio*, 442 F. 2d 276 (7th Cir. 1971) cert. granted sub nom *United States* v. *Dionisio*, 92 Sup. Ct. 2056 (1972).** Further, at least one Court of Ap-

* The Court did indicate that some of the material would not be privileged:

> "Defendant's brief states that Miss Walker testified that she had heard of defendant and that she called his office and spoke with him, arranged to meet him, and retained him. None of these matters are privileged because the privilege applies only to communications made by Miss Walker to defendant." People v. Adam, 51 Ill. 2d at 49.

** The fact that Dionisio is factually distinguishable from this case and that there is a stronger rationale for the decision in Dionisio than is present here does not mean that respondent concurs with the decision in Dionisio. It would be our view that Dionisio is wrongly decided.

peals has found even the rationale in Dionisio unpersuasive. In *United States* v. *Doe*, 457 F. 2d 895 (2nd Cir. 1972), stay granted *Doe* v. *United States*, 92 Sup. Ct. 2055 (1972), the Court held that:

> "In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject of course to . . . the Fifth Amendment . . . when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest requirement as a showing of 'reasonableness'—with the delay in the functioning of the grand jury which that would inevitably entail," 457 F. 2d at 899-900.

Regardless of the merits of the decisions cited by petitioner, it seems to us that no construction of the Fourth Amendment can justify requiring the government to show probable cause to compel testimony from one who appears solely as a witness and not as a potential defendant. If the Fourth Amendment erects a barrier between grand jury and witness, the same barrier stands between the court and the witness at trial and the same barrier stands in civil as well as criminal cases. Surely such a result was not intended by the draftsmen of the Fourth Amendment and surely policy considerations would not sanction this new extension of the Fourth Amendment.

The petitioner also claims that the attorney-client privilege was violated in his case. The Illinois Supreme Court did not reach the question of the applicability of the privilege because it decided that if there were privilege, the privilege was waived by the client's testimony before the grand jury. The petitioner criticizes the record on which this determination was made, but he lacks standing to do so for it was his brief on appeal that the Court relied upon:

> "Defendant's brief, however, states that in her testimony she told the grand jury when she employed de-

fendant, and also related the conversations held with defendant in Pincham's car while enroute from the latter's home to the Criminal Courts Building. It is also stated in defendant's brief that while she testified before the grand jury defendant waited outside the grand jury room and that she repeatedly left the grand jury room and conferred with defendant. Defendant does not argue that Shirley Walker was not aware of, and could not, therefore, waive the attorney-client privilege. Under the circumstances shown we need not and do not decide whether the answers to the first and third questions are privileged, because if so, the privilege was waived." *People* v. *Adam,* 51 Ill. 2d at 48-49.

Even if there were no waiver, the question of privilege can not be resolved by this Court. There is no federal requirement that the States recognize or enforce any attorney-client privilege. The attorney-client privilege may be, and often is, extended to differing degrees in the various States. Wigmore thought the privilege should be narrowly limited. See *8 Wigmore, Evidence,* pp. 557-58 (3rd Ed. 1940) (p. 554, McNaughten Rev. 1961). McCormick said "it would be hard to maintain that a privilege for lawyer-client communication would facilitate more than it would obstruct the administration of justice. *McCormick, Evidence,* p. 182 (1954). See also *Branzburg* v. *Hayes,* 92 Sup. Ct. 2646, 2660 N. 29 (1972). The petitioner gratuitously assumes that the attorney-client privilege is required by the Constitution. Yet it is clear that even a long-standing privilege (with arguably greater justification) such as the physician-patient privilege has no constitutional sanction. See *Felber* v. *Foote,* 321 F. Supp. 85, 87-88 (D. Conn. 1970) (three judge court). The notion that a privilege can be extrapolated as supportive in an indirect way of other constitutional guaranties was laid to rest in *Branzburg* v. *Hayes,* 92 Sup. Ct. 2646 (1972).

Simply stated, there is no federal issue presented by the ruling below that there was a waiver of privilege because there is no federal right involved in the waiver.

CONCLUSION.

For the foregoing reasons, the respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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